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Insights: Legal Alert

NLRB Issues New Final Rule on Joint Employers

FEBRUARY 27, 2020 Written by Thomas H. Christopher

Summary

This week, the National Labor Relations Board (NLRB/Board) issued a new rule effectively overturning an Obama-era precedent on joint-employer status and making it harder to show that two companies were joint employers. In doing so, it lessened – at least for the moment – the threat of various entities being found to be joint employers in many circumstances where they did not intend to be, or where they would not have been found to be joint employers under prior law. The final rule just announced returns the Board to a focus on whether the putative joint employer has and exhibits "direct and immediate control" over substantial terms and conditions of employment. It effectively overturns the Obama-era NLRB precedent in *Browning-Ferris*, decided in 2015. When *Browning-Ferris* was decided, it overruled more than 30 years of past Board precedent and said that the Board would look to see whether the putative joint employer "possesses sufficient control over employees' essential terms and condition of employment to permit meaningful bargaining." Under the final rule just announced, that will no longer be the standard.

Background

For a number of years now, employers have been expecting promised clarity on the definition of a "joint employer" from various federal agencies. Earlier this year, the U.S. Department of Labor announced an interpretive regulation that narrowed the definition of joint employer under the Fair Labor Standards Act (FLSA). This week the NLRB became the second agency to issue a clarifying rule on joint employer status by releasing its final rule under the National Labor Relations Act (NLRA). Notably, the EEOC has also indicated it will release guidance that defines joint-employer status under the various federal anti-discrimination laws, which should include (at a minimum) Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

The NLRB's changes to the joint-employer standard have been in progress since at least September 13, 2018, when it issued a Notice of Proposed Rulemaking (NPRM) on the matter. During the public comment period, the NLRB received and considered nearly 29,000 comments on this important issue. The NLRB's final rule will carry the force of law. Absent a successful challenge, the rule is scheduled to become effective on April 27, 2020; however, an attempt to overturn the final rule is expected.

Joint-Employer Obligations under the National Labor Relations Act

Under the NLRA, finding joint-employer status has a meaningful impact on a corporation and its obligations, especially related to collective bargaining, strike activity, and unfair labor practices liability. The NLRB expressed concerns throughout this process that because of these "important consequences," the purposes of the NLRA were "not furthered by drawing into a collective bargaining relationship, or exposing to secondary coercion and joint-and-several liability, a direct employer's business partner that does not actively participate in decisions setting employees' wages, benefits, and other essential terms and conditions of employment." According to the NLRB, the

final rule “restores the joint-employer standard that the Board applied for several decades prior to the 2015 decision in *Browning-Ferris*, but with the greater precision, clarity, and detail that rulemaking allows.” The NLRB intends that, with the completion of the final rule, “employers will now have certainty in structuring their business relationships, employees will have a better understanding of their employment circumstances, and unions will have clarity regarding with whom they have a collective-bargaining relationship.”

Goodbye to the Browning-Ferris Standard for Joint Employers

The NLRB's *Browning-Ferris* decision “unsettled the law in this [] important area.” Prior to this decision, the standard in place for over 30 years required “two separate entities [to] share or codetermine those matters governing the essential terms and conditions of employment,” before finding a joint employer status existed. Before finding a joint employer relationship, the NLRB required evidence that an entity “meaningfully affect[ed]” the terms of employment and that it exercised “direct and immediate” control over such employment matters. However, in 2015, the Board overruled this precedent and created a new two-prong test: (1) whether a common-law employment relationship existed; and, (2) whether the putative joint employer “possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining.” This ended the “direct and immediate” evidence standard previously applied for decades in joint employer questions.

The Final Rule for Joint Employers under the NLRA

The final rule returns to the “direct and immediate control” standard applied prior to *Browning-Ferris*. While it effectively overrules the Board's decision in *Browning-Ferris*, the final rule also leaves behind some flexibility to consider “evidence of indirect control over essential terms and conditions of employment [as] probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control over essential terms and conditions of employment.” According to the NLRB, the final rule:

- “Specifies that a business is a joint employer of another employer's employees only if the two [companies] share or codetermine the employees' essential terms and conditions of employment;”
- “Clarifies the list of essential terms and conditions: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction;”
- “Provides that to be a joint employer, a business must possess and exercise such substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees as would warrant a finding that the business meaningfully affects matters relating to the employment relationship;”
- “Specifies that evidence of indirect and contractually reserved but never exercised control over essential terms and conditions, and of control over mandatory subjects of bargaining other than essential terms and conditions, is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control;
- Defines the key terms used in the final rule, including what does and does not constitute “substantial direct and immediate control” of each essential employment term;” and,
- “Makes clear that joint-employer status cannot be based solely on indirect influence or a contractual reservation of a right to control that has never been exercised.”

The final rule also carves out certain of the various elements of the independent contractor tests, saying that while

the Board believes that the common-law factors relative to determining an independent contractor may be "instructive," they "are of limited utility in the joint employer context." The final rule notes that while the independent-contractor tests may "assist in determining whether a putative employer has [] a 'right to control[,]'" they "do not assist in answering the key questions in the joint employer inquiry: *who* is exercising that control, *when*, and *how*."

Reception to the Final Rule and Practical Implications

The final rule is considered to be very employer friendly. It was developed by NLRB Chairman John F. Ring and two sitting Republican colleagues; the final two seats – which are to be filled by Democrats – remain vacant. Unsurprisingly, responses to the final rule have been largely split down partisan lines. Representative Rosa DeLaura (D-Conn.), chair of the House Appropriations subcommittee with labor issue jurisdiction, has all but promised to use Congressional authority to "stop this rule." Conversely, Rep. Virginia Foxx (R-N.C.), the ranking member of the House Education and Labor Committee, has applauded the rule, saying she hoped it would "allow more Americans to pursue the American Dream free from … government red tape."

Supporters of the rule, like Chairman Ring, hope the "final rule gives [the NLRB's] joint-employer standard the clarity, stability, and predictability that is essential to any successful labor-management relationship and vital to our national economy." Advocates opposed to the new rule have expressed concerns that the final rule will allow larger corporations to shield themselves from both liability for temporary workers and negotiations with labor organizations over wages and benefits. Legal challenges to the final rule are all but guaranteed.

The final rule should increase a business' ability to predict its liability for workers. On one hand, franchisors are not likely joint-employers with the franchisees who maintain direct and immediate control over their own employees. On the other hand, the final rule is not expected to remove the often formed joint-employer status between companies and staffing agencies. While the rule should decrease concerns between entities who enter into business agreements with other companies by limiting the risk of being deemed a joint employer, the joint employer doctrine still exists. Even though the joint employer doctrine has been improved for employers, it is still very viable and must be complied with.

Related People



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